



REPUBLIC OF KENYA



KENYA LAW
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Tonui v Anzeze & 6 others (Civil Case 84 of 2016)
[2022] KEHC 10632 (KLR) (Commercial and Tax) (23 May 2022) (Ruling)

Neutral citation: [2022] KEHC 10632 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 84 OF 2016
DAS MAJANJA, J
MAY 23, 2022

BETWEEN

DAVID KIBET TONU I PLAINTIFF

AND

EPAINITUS GALO ANZEZE 1ST DEFENDANT

ERIC NDUMBU MWANDIA 2ND DEFENDANT

GODWIN WANGONG’U 3RD DEFENDANT

KENYA AIRPORTS PARKING SERVICES LIMITED 4TH DEFENDANT

LAWRENCE MADIALO 5TH DEFENDANT

SAMUEL KAHIGA 6TH DEFENDANT

AZICON KENYA LIMITED 7TH DEFENDANT

RULING

1. The 4th Defendant has moved the court by the Notice of Motion dated 15th March 2020 made under Order 42 rule 6 of the Civil Procedure Rules seeking an order that, ‘there be a stay of further proceedings in this suit pending the hearing and determination of an appeal by the 4th Defendant from the Ruling and Orders of this court (Grace Nzioka J.) dated 23rd June 2017’. The application is supported by the affidavit of Paul Amuga, the 4th Defendant’s advocate, sworn on 17th March 2022 and opposed by the Plaintiff through his replying affidavit sworn on 6th May 2022.
2. It is not in dispute that the 4th Defendant proposes to appeal against the ruling of Nzioka J., dated 23rd June 2017 in which the 4th Defendant’s preliminary objection was dismissed. The 4th Defendant sought to dismiss the suit on the ground that no leave had been sought and obtained to continue the



suit as a derivative suit and that the only leave given was for leave to institute the suit before it was filed. Further that court lacked jurisdiction to deal with the claim relating to the Plaintiff's position as the managing director of the 7th Defendant since such a claim relates to employment and that it ought to be filed in the Employment and Labour Relations court.

3. The 4th Defendant argues that if the intended appeal succeeds, the entire suit will stand struck out or dismissed. It states that it is in the interests of just and of all parties that there be a stay of proceedings in order to obviate the waste of parties resources and the court's time.
4. The Plaintiff takes the view that to date the appeal has not been filed and that the application is a tactic to delay the matter to the detriment of the Plaintiff since the intended appeal has not chances of success. He accuses the Plaintiff impeding prosecution of the matter by failing to comply with pre-trial directions and by also filing an application to stay the matter pending arbitration which was in fact dismissed. The Plaintiff urges the court to dismiss the application since this suit has been in court since 2016 and it is in the interests of justice that the matter be heard. The Plaintiff states that as Managing Director of the 4th Defendant, he has received a notice to produce records of the company from the Kenya Revenue Authority which he cannot deal with as long as this suit is still pending as the documents are subject to determination of this suit.
5. What are the principles governing the grant of stay of proceedings pending appeal? In *Kenya Wildlife Service v James Mutembei* [2019] eKLR, Gikonyo J., held that:

“Stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent.”

6. Further, in *Re Global Tours & Travels Limited* Nairobi HC Winding up Cause No. 43 of 2000 (UR) Ringera J., explained as follows:

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

7. Finally, the Court of Appeal in *David Morton Silverstein v Atsango Chesoni* [2002] eKLR observed that ultimately, each decision must be considered on its own merits. It held that:

“The Court is not laying down any principle that no order for stay of proceedings will ever be made; that would be contrary to the provisions of rule 5 (2) (b) of the Court's own rules. But as the court pointed out in the case we have already cited, each case must depend on its own facts and the facts of this particular case before us, as were the facts in the earlier case, do not show that the appeal will be rendered nugatory if we do not grant a stay.”



8. On the issue of whether the intended appeal has merits, I would only state that the appeal is not frivolous. What is clear from the decision appealed from is that the learned judge was convinced that the Plaintiff had leave to commence the suit and that the issue of the subject matter is one for employment was factual and ought to be raised through a formal application. Bearing these findings in mind, I am not inclined to grant an order of stay of proceedings merely because the Court of Appeal may set aside the entire proceedings. In my view, the issues raised by the 4th Defendant are still live issues since the court did not make final and definitive findings. This will ultimately affect whether the court will grant the Plaintiff the reliefs it seeks.
9. I am also convinced that it is in the interests of justice that this suit, which has been on the court rolls for over 5 years should be heard once and for all. In the event the Court of Appeal allows the appeal and sets aside the proceedings, costs will be paid by the losing party. The 4th Defendant has not demonstrated that the intended appeal will be rendered nugatory. I am further convinced that it would not be in the interests of justice to hold the matter in abeyance given the period it has taken to reach this stage.
10. It is for the reasons that I have set out above that I dismiss the Notice of Motion dated 15th March 2020.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MAY 2022.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Ligami instructed by Lilan & Koech Associates Advocates LLP for the Plaintiff.

Mr Amuga instructed by Amuga and Company Advocates for the 4th Defendant.

Mr Ongegu instructed by Ongegu and Associates Advocates for the 1st, 2nd, 5th and 6th Defendants

